IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 871 of 1995,

SPECIAL CIVIL APPLICATION No 2902 of 1995
AND
SPECIAL CIVIL APPLICATION NO. 6675 of 2002.

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHARATKUMAR DEVKARANBHAI PATEL

Versus

DIST PRIMARY EDUCATION OFFICER

Appearance:

1. Special Civil Appln No. 871 of 1995 & 2902 of 1995
MR KB PUJARA for Petitioner No. 1-5
MS SANGITA PAHWA for M/S THAKKAR ASSOC. for Respondent No. 1
MS REETA CHANDARANA, ASSTT. GOVERNMENT PLEADER for Respondent No. 2-3

2. Special Civil Application No. 6675 of 2002
MR PUSHPADATT VYAS for Mr.B.S. PATEL for the petitioner
MS SANGITA PAHWA for M/S THAKKAR ASSOC. for Respondent No. 1
MS REETA CHANDARANA, ASSTT. GOVERNMENT PLEADER for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 20/09/2004

COMMON ORAL JUDGEMENT

Since these petitions involve identical questions of law and facts, they have been heard together and are being disposed of by this common judgement.

2. For the sake of convenience if one notices the facts as mentioned in Special Civil Application No. 871 of 1995, it is the case of the petitioners that the respondents had on 8.2.1992, issued an advertisement in the local newspaper, inviting applications from eligible candidates for the post of Education Inspectors. The petitioners contend that being eligible they had applied for being selected to the said post of Education Inspector in the Sabarkantha District, procedure for selection of which posts was initiated by the respondents by the above mentioned advertisement dated 8.2.1992. The petitioners have contended that pursuant to an oral interview, the respondents had prepared a select list of 18 candidates, wherein the petitioners were placed at serial Nos. 8, 9, 10, 12 and 16 respectively. The said decision was in fact communicated to the petitioners by the respondents. The petitioners have further contended that when the respondents made appointments of only 7 candidates from the said select list, the petitioners made representations to the respondents, which were not replied to. The petitioners therefore, contending that the respondents have acted illegally in not making appointments though vacancies are available, approached this Court by filing the above mentioned petitions.

3. In response to the notice issued by this Court, the District Primary Education Officer has filed affidavits in reply. In the affidavit in reply dated 22.5.1995, it is contended inter-alia that the Staff Selection Committee initiated the recruitment process for the post of Education Inspectors for filling up 6 vacancies by way of direct recruitment. It is further stated that pursuant to the decision of the Committee, an advertisement was given in the local newspaper on 8.2.1992. It is stated that the Committee had specifically decided to initiate the said process for filling up of 6 posts by way of direct recruitment. It is further stated that therefore only 6 candidates were required to be recruited and a list of 7 candidates ought to have been prepared and it was a mistake to draw a list of 18 candidates. It is reiterated that at the relevant

time there were only 6 vacancies available for direct recruitment to the post of Education Inspectors and therefore, list of not more than 7 candidates ought not to have been prepared. In the said affidavit it is further stated that first 7 candidates from the list so prepared have already been appointed to the post of Education Inspectors and since none of the petitioners find place in the first 7 candidates, there is no illegality committed by the respondents and the petitioners can make a grievance only if any persons less meritorious than the petitioners are given appointment by the Committee. It is further stated that mere inclusion in the select list would give no right to be appointed to the post in question. Further affidavit-in-rejoinder and surrejoinder have also been filed and since prima-facie certain statements made by the respondents in the further affidavits did not reconcile with the averments made in the first affidavit-in-reply dated 22nd March, 1995, this Court had requested the learned Counsel for the respondents to make available the minutes of the meetings leading to the selection process. Accordingly, the learned Counsel for the respondent No.1 Ms. Sangita Pahwa has produced on record the minutes of the meeting dated 31.1.1992 of the Staff Selection Committee. In the said meeting at Resolution No.3, it is noted that for the post in question there are 7 vacancies on account of retirements and 6 vacancies are anticipated by 31st August, 1993 upon further retirements of the existing incumbent. Additionally, the Government by its Resolution dated 15.2.1992 has sanctioned 10 more posts and therefore, in all 23 vacancies are likely to be available, of which as per the Recruitment Rules, 75% of the vacancies are required to be filled in by promotion and 25% by direct recruitment. It is therefore, noted that 6 vacancies would be available for direct recruitment. The learned Counsel for the respondent No.1 has also made available the minutes of meeting of the Selection Committee dated 29.4.1992, in which it is recorded inter-alia at Resolution No.2 that despite the letter from the Government requesting the Committee not to make further appointments, looking to the large number of vacancies it is necessary to go ahead with the holding of the interview for direct recruitment for which an advertisement had been given in the newspaper of 8.2.1992. In the further affidavit-in-rejoinder filed on behalf of the respondent No.1 on 2nd August, 2004, it is stated that the Government had directed the respondent No.1 not to make appointments as the Government was considering the amendments in the Recruitment Rules for the post of Education Inspector.

4. In this factual background, the petitioners have approached this Court and have sought a direction to quash and set aside the action of the respondents in not issuing appointment orders for the post of Education Inspector, though the petitioners are duly selected by the Staff Selection Committee and placed in the select list.

5. Appearing for the petitioners in Special Civil Application Nos. 871 of 1995 and Special Civil Application No. 2902 of 1995, the learned Counsel Mr. K.B. Pujara has contended (i) that the action of the respondents in refusing to appoint the petitioners is illegal; (ii) that when the petitioners' names were found in the select list, the respondents cannot refuse to appoint the petitioners without valid reason; (iii) that as per the prevailing Rules, the life of the select list is till the new selection list is prepared and according to him fresh select list has so far not been prepared; (iv) that there were as many as 18 vacancies at the relevant time for being filled-up by the direct recruits and that therefore, the respondents erred in making only 7 appointments; and that the reason given for not making further appointments is also not germane. He submits that the only reason provided is that the Government is considering amendment in the Recruitment Rules. He submits that in view of the settled legal position when the selection process has started and the select list is already prepared, vacancies cannot be filled by applying amended Recruitment Rules even if the amendments are brought in to force subsequently. He contents that even at present the Recruitment Rules are not modified.

5.1 Learned Counsel Mr. Pujara, relying on the communication dated 15.5.1992 from the respondent No.1 to the petitioner of Special Civil Application No. 2902 of 1995, contended that the petitioner was getting an appointment elsewhere, but on the basis of the promise held out in the letter dated 15.5.1992, in which it is stated that the petitioner is at serial No.14 in the waiting list and he will be given appointment in the future vacancies, petitioner did not accept the employment elsewhere and that therefore, the respondents on the ground of promissory estoppel also should be directed to make his appointment. Mr. Pujara has relied upon three decisions of this Court, namely in the cases of Chaudhari Govabhai Nathubhai and ors. Vs. Banaskantha Jilla Panchayat Seva Pasand Samiti and ors. reported in 1988 (1) GLH (U.J) 14; Gujarat State Civil Supplies Corporation Ltd. Vs. Dashrathlal L. Patel, reported in 1993 (2) GLR 1676; and Rathodbhai J.

Dungarbhai & ors. Vs. State of Gujarat and ors., reported in 1995 (1) GLH 180. I will advert to these decisions at some length at a later stage.

6. Learned Counsel Mr. Pushpadatt Vyas appearing for the petitioner in Special Civil Application No. 6675 of 2002 has adopted the arguments of Mr. K.B. Pujara.

7. Appearing for the respondent No.1, learned Counsel Ms. Sangita Pahwa has submitted that at the relevant time there were only 6 vacancies meant for direct recruitment quota and therefore, the petitioners cannot claim the appointment. She submits that there is no material on record to suggest that the data provided by the respondent No.1 is incorrect and that more vacancies than those indicated were meant for direct recruits. She has submitted that a candidate cannot claim appointment simply on being placed in the select list and it is open for the appointing authority not to make appointments for valid reasons. She has relied on the directives of the State Government to contend that in any case, appointments could not have been made in view of the prohibition imposed by the Government. The learned Counsel has also submitted that the select list having expired, pendency of the petition would not enable the petitioners to seek appointment. She has submitted that this Court cannot grant mandate to the appointing authority to make appointments.

7.1 Relying upon the decision in the case of Government of Orissa, Through Secretary Commerce and Transport Department, Bhubaneshwar Vs. Haraprasad Das and ors. reported in (1998) 1 SCC 487, she contended that being placed in the select list does not confer any right on the candidate for being appointed.

7.2 The learned Counsel for the respondent No.1 has also relied on the decision of the Hon'ble Supreme Court in the cases of State Bank of Bihar & ors. Vs. M.D. Kalimuddin & ors. reported in (1996) 2 SCC 7 and State of U.P. & ors. VS. Harish Chandra & ors. reported in (1996) 9 SCC 309 to contend that once the life of the select list has exhausted, there can be no direction for operating such a select list. The learned Counsel has also placed reliance on the decision of this Court in Vaghora N. Murji & ors. Vs. State of Gujarat, reported in 2000 (1) GLH 646 to contend that a candidate does not acquire indefeasible right of appointment merely on the placement of his name in the select panel and once the appointments are made from the select list against all notified vacancies, the select list and the wait list

stand exhausted and no directions can be given for making appointments from such select list.

8. Ms. Reeta Chandarana, learned Assistant Government Pleader has adopted the arguments of learned Counsel for the respondent No.1 and has prayed that the petitions be rejected.

9. Before noting the legal position, if we take stock of the factual position arising in these petitions, it is undisputed that the respondents had issued an advertisement on 8.2.1992 calling applications from eligible candidates for the post of Education Inspectors. It is also not in dispute that in the said advertisement, number of vacancies to be filled by this process was not indicated. It is also not in dispute that the Selection Committee prepared a list of 18 candidates and actually gave appointment orders to first 7 candidates whose names appeared in the select list. It is also not in dispute that none of the petitioners herein appeared in the said list of top 7 candidates. It is not the case of the petitioners that any of the selected candidates who received the appointments by the respondents did not report for duty and that therefore such a vacancy remained unfilled. From the minutes of the Selection Committee dated 31.1.1992 made available to the Court by the respondents, it is clearly emerging that the Selection Committee was undertaking the task of selecting by way of direct recruitment, candidates to fill up 6 vacancies meant for direct recruits. The Selection Committee has given complete break-up of existing and anticipated vacancies, according to which, considering the existing vacancies and the vacancies likely to arise by 31st August, 1993 due to retirement of persons already working, there would be 23 vacancies in the cadre of Education Inspector. The Committee therefore ear-marked 25% of the vacancies or 6 in number, for the purpose of direct recruitment. The remaining vacancies were reserved for promotion quota as per the Recruitment Rules, since the Recruitment Rules required that the vacancies should be filled by promotees and direct recruits in the ratio of 75% : 25%. There is no dispute about this aspect of the matter.

9.1 Learned Counsel Mr. Pujara however, contends that the respondents have not specified the entire break-up of vacancies filled up so far to justify 6 vacancies for direct recruitment only. In the petition or in the rejoinder filed by the petitioners, I do not find any specific case being made out by the petitioners to suggest that there was a backlog of direct recruitment

quota and the respondents had in the past given more appointments to the promotees and that therefore more than 6 vacancies would be justified for being ear-marked for direct recruits. Since no such case has been sought to be made out by the petitioners, it cannot be expected of the respondents to go beyond what has been already stated in the affidavit and what has been noted in the minutes of Selection Committee meetings which have been produced on record. I therefore conclude that advertisement dated 18.2.1992 was for making appointments by way of direct recruitment to the post of Education Inspector for 6 vacancies in the said cadre falling in the District of Banaskantha.

9.2 In the decision of the Hon'ble Supreme Court in the case of Shankarsan Dash Vs. Union of India, reported in AIR 1991 SC 1612, the apex Court has observed that inclusion of candidate's name in the merit list does not confer any right to be selected and it cannot be said that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidate acquire an indefeasible right to be appointed which cannot be legitimately denied. In paragraph 7, the Hon'ble Supreme Court made following observations:-

> "7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of vacancies are found fit, the successful candidates acquire an indefeasible right to be appointed, which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant Recruitment Rules so indicate, the State is under no legal duty to fill-up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill-up the vacancies has to be taken bonafide for appropriate reasons. And if the vacancies or any of them are filled-up the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana Vs. Subhash Chander Marwaha (1974) 1 SCR 165 = (AIR 1973 SC 2216), Ms Neelima Shangla Vs. State of Haryana

(1986 4 SCC 2688 = (AIR 1987 SC 169), or Jitendra Kumar Vs. State of Panjab, (1985) 1 SCR 899 = (AIR 1984 SC 1850)."

9.3 This view has been reiterated and followed in number of decisions thereafter. In the later decision of the Hon'ble Supreme Court in the case of State of Bihar & ors. Vs. The Secretariat Assistant, Successful Examinees Union 1986 and ors. reported in AIR 1994 SC 736, it has been observed that empanelment of candidate in the select list is only a condition of eligibility and does not create a vested right of appointment. In paragraph 10, following observations were made:-

"10. It is now well settled that a person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanellment is at the best a condition of eligibility for purposes of appointment and by itself does not amount to selection or create a vested right to be appointed unless relevant service rule says to the contrary. (See Shankarsan Dash Vs. Union of India 1991 (3) SCC 47 = (AIR 1991 SC 1612) and Sabita Prasad Vs. State of Bihar, 1992 (3) Scale 361)."

9.4 In the decision reported in 1998 1 SCC 487 (supra) on which reliance has been placed by the learned Counsel for the respondent No.1 also the Supreme Court has made similar observations.

9.5 In the decision of the Hon'ble Supreme Court in the case of Ashwani Kumar Singh VS. U.P. Public Service Commission and ors. reported in (2003) 11 SCC 584, it is held that it is not a rule of universal application that whenever vacancy exists, persons who are in the merit list perforce have to be appointed and much would depend upon the statutory provisions governing the field.

9.6 In the decision of the Hon'ble Supreme Court in the case of Bihar State Electricity Board Vs. Suresh Prasad & ors. reported in (2004) 2 SCC 681, the apex Court held that there was no statutory rule which require the appellant Board to prepare a waiting list in addition to the panel and no rule was shown in support of the contention that when 18 candidates failed to turn-up, the appellant was bound to offer the post to the candidates in the waiting list. In that view of the matter, the Hon'ble Supreme Court found that there was no infirmity in the judgement sought to be reviewed.

9.7 Even in the decision relied upon by the learned Counsel for the petitioners Mr. K.B. Pujara reported in 1995 (1) GLH 180, this Court was pleased to record that notification of vacancies or existence thereof does not give a legal right to the candidate to be selected for the appointment and notification of vacancies is simply an invitation to the qualified candidates to apply for recruitment and on inclusion of their names in the select list they do not acquire any right to the post and it is open to the Government not to fill up all the vacancies for a valid reason. Unless the relevant Recruitment Rule so indicates the State is under no legal duty to fill-up all or any of the vacancies.

10. On the basis of the above legal position and applying the same to the facts of the present case, I find that at the relevant time when the Selection Committee issued the advertisement on 8.2.1992, there were only 6 vacancies meant for the direct recruits. Though the advertisement itself does not indicate the number of vacancies to be filled-up, by no stretch of imagination the candidates applying in response to the said advertisement can stake their claim for vacancies in excess of the number for which the selection process was undertaken. Obviously, the candidate cannot insist that their appointments be made in excess of the quota meant for direct recruitment since such a direction would be dehors statutory Rules. It is not the case of the petitioners that all or any of the selected candidates who were actually issued appointment orders did not report to accept appointments. In that view of the matter, none of the petitioners had any right to claim the appointments from the respondents. The placement of the petitioners in the so-called select list is a misnomer and of no consequence. When there are only 6 vacancies, it was not even open for the respondents to prepare a select list of 18 candidates. Placing the petitioners' name in the select list would at the best tantamount to placing the names of the petitioners in the waiting list to be operated in accordance with the Rules in case any of the appointees fail to show up and refuse appointment. The right of the petitioners cannot travel beyond this limit.

11. In view of the above discussion, since I find that there were only 6 vacancies at the relevant time for direct recruitment and 7 appointments were already made from the list prepared by the Selection Committee, it is not necessary for me to go into other questions such as the life of the waiting list and the reasons for

non-operating list upon the directives of the Government.

12. The reliance placed by the learned Counsel for the petitioners Mr. Pujara on the decisions of this Court also would not change the situation. In the decision of Chaudhari Govabhai Nathubhai (supra), this Court was concerned with a situation where the petitioners who were candidates selected for the post and no appointments were made though no new select list was prepared. This Court therefore on the basis of the assurance by the respondents time and again directed that the select list should be operated till the fresh list is prepared and if there are vacancies, appointments should be made.

13. In the decision of Gujarat State Civil Supplies Corporation Ltd. (supra) this Court was examining the decision of the learned Single Judge, wherein it was found that selection made under the existing Rules was sought to be cancelled on the strength of the subsequently but prospectively amended Recruitment Rules. The learned Single Judge having struck down such an action, the Division Bench upheld the decision. While doing so the Division Bench observed that process of selection carried through the required avenues in conformity with the existing rules and having culminated in drawing up a select list duly published wherein the petitioners did not find a place, could not have been abandoned on any of the grounds as suggested and done by the respondent Corporation.

14. In the decision of Rathodbhai Dungarbhai (supra) also this Court was concerned with a situation where candidates already selected under old Rules of 1967 were sought to be discarded on subsequent change of Rules. Even then this Court had observed that a candidate who is placed in the select list does not acquire an indefeasible right to be appointed.

15. The above decisions, reliance on which is sought to be placed by the learned Counsel Mr. Pujara are distinguishable on facts. As discussed earlier in the facts of the present case, I have concluded that at the relevant time in the year 1992 when the select list was being prepared, there were only six vacancies meant for direct recruitment and in that view of the matter, the petitioners are not justified in seeking appointments in excess of the said number when admittedly 7 candidates from the select list so prepared by the Committee have already been appointed. The argument of promissory estoppel also cannot be accepted. Firstly the

communication made to the petitioner of Special Civil Application No. 2902 of 1995 was that his name is included in the wait list. Obviously therefore, no hope was being held out to the petitioner that he is bound to receive appointment order. Secondly, it was always open for the petitioners to secure appointment elsewhere and accept the current appointment if the same came in future. The petitioners cannot contend that they did not accept offer of appointment from others solely on the basis of expectation that they would be absorbed in the present selection process. In any case, such a contention cannot take form of a legally enforceable right on the basis of law of promissory estoppel. Even otherwise it is by now established that there cannot be any estoppel against statute. When the statutory rules provide for a certain quota for promotees as well as direct recruitees, the same cannot be directed to be infringed on the ground of promissory estoppel.

16. In the result, I find no merit in the petitions and the same are therefore, hereby rejected. Rule is discharged in each matter with no order as to costs.

(Akil Kureshi, J.)

*/Mohandas